Carlson White (M) Sdn Bhd v Mutiara Metropolis Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP NO D1–28–111 OF 1996
REKHRAJ J
4 SEPTEMBER 1996

Companies and Corporations — *Winding up — Appeal against winding up — Delay — Whether appeal lies to High Court without firstly having exhausted pre-requisite provisions of ss 243 and 307 of Companies Act 1965*

The petitioners presented a petition against the respondents for their inability to pay the debt. The petitioners' solicitors at the hearing on 25 July 1996 elected to withdraw the petition. The supporting creditors then placed themselves as substituted petitioners and prayed that the respondent company be wound up. The court thereupon wound up the company. Subsequently on 12 August 1996, the respondents filed a notice of motion for an order, inter alia, that the winding-up order made against the respondent be discharged. The notice of motion was subsequently withdrawn by the respondents and the court dismissed the same with no liberty to refile. After three years on 8 April 1999, a notice of appeal was filed in the High Court registry against the decision made on 25 July 1996. The issue was whether an appeal in fact lies to the High Court, without firstly having exhausted the pre-requisite provisions of ss 243 and 307 of the Companies Act 1965 ('the Act').

Held:

The remedy of the aggrieved party (in this case, the respondents) is not by way of appeal to the Court of Appeal, but by way of application to court under a notice of motion for a stay order under s 243(1) of the Act, and followed by a declaratory order under s 307 of the Act. In this case however, the time to invoke s 307(1) has now run out against the respondent by an effluxion of time as any such application is required to be made within two years of the date of dissolution of the company (see p 368F–G).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memngemukakan petisyen terhadap responden-responden kerana tidak mampu membayar hutang. Peguam-peguam pempetisyen-pempetisyen pada masa perbicaraan pada 25 July 1996 memilih untuk menarik balik petisyen tersebut. Kemudian pemiutang sokongan meletakkan diri mereka sebagai pengganti pempetisyen-pempetisyen dan memohon agar syarikat responden digulungkan. Kemudian pada 12 Ogos 1996, responden telah memfailkan suatu notis usul untuk perintah, antara lain, bahawa perintah penggulungan yang dibuat terhadap responden dilepaskan.

Kemudian notis usul tersebut ditarik balik oleh responden-responden dan mahkamah telah menolaknya dengan tiada kebebasan untuk memfailkan semula. Selepas tiga tahun pada 8 April 1999, suatu notis rayuan telah difailkan di pendaftaran Mahkamah Tinggi terhadap keputusan yang dibuat pada 25 Julai 1996. Isu adalah sama ada suatu rayuan benar-benar boleh dibawa ke Mahkamah Tinggi, tanpa perlu dengan terdahulu menggunakan peruntukan pra-syarat di bawak ss 243 dan 307 Akta Syarikat 1965 ('Akta tersebut').

Diputuskan:

Remedi untuk pihak yang terkilan (di dalam kes ini, responden-responden) bukanlah dengan cara merayu kepada Mahkamah Rayuan, tetapi melalui permohonan kepada mahkamah di bawah notis usul untuk perintah penggantungan di bawah s 243 Akta tersebut, dan diikuti oleh suatu perintah deklarasi di bawah s 307 Akta tersebut. Namun di dalam kes ini, masa untuk membangkitkan s 307(1) telah pun luput terhadap responden dengan pengalihan masa kerana sebarang permohonan mestilah dibuat di dalam dua tahun dari tarikh pembubaran syarikat tersebut (lihat ms 368F–G).]

Notes

For cases on winding up generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 618–918.

Legislation referred to

Companies Act 1965 ss 243(1), 307(1)
Companies (Winding-up) Rules 1972
Courts of Judicature Act 1964 s 68(1)
Rules of the Court of Appeal 1994 rr 12, 16

JH Low (*Ching Tan & Associates*) for the substituted petitioner.
SK Wan (*YT Ling* with him) (*SK Wan & Partners*) for the respondents.

Rekhraj J: The petitioners presented a petition against the respondents for their inability to pay the debt in the sum of RM50,000. The petition was fixed for hearing on 25 July 1996. At the hearing, Miss Phang Sweet Ping appeared for the petitioner, Mr JH Low for Selangor Dredging Bhd, a supporting creditor, and Puan Sharifah Noraini for the Official Receiver. The respondents and/or their solicitors were absent.

The papers were found to be in order; the registrar's certificate pursuant to r 32 of the Companies (Winding-up) Rules 1972 had been issued.

The petitioners' solicitors at the hearing elected to withdraw the petition as a post-dated cheque in settlement had been received. Whereupon, the supporting creditors, Selangor Dredging Bhd who having filed a proper notice of intention to appear at the hearing to support the petition, placed themselves as substituted petitioners and prayed that the

respondent company be wound up as otherwise, the withdrawing petitioners would be obtaining a fraudulent preference in the payment.

The respondents and/or their solicitors having conveniently elected to absent themselves at the hearing, the court wound up the company by substituted petitioner.

Subsequently on 12 August 1996, the respondents through its contributory, Efarzed Holding Sdn Bhd, filed a notice of motion fixed for hearing on 22 August 1996, for an order:

(i) that the winding-up order made against the respondent on 25 July 1996 be discharged;

(ii) alternatively, the proceedings be stayed pending the respondent's appeal;

(iii) that all proceedings in relation to the winding-up be stayed altogether under s 243 of the Companies Act pending the disposal of Kuala Lumpur High Court Civil Suit No S4-22-289-96, or until such time the honourable court deems fit; and

(iv) in the other alternative, notwithstanding the winding-up order as made, the respondent be granted leave to bring and/or to defend the action, in lieu of the liquidator.

The said notice of motion came up for hearing on 4 September 1996, on which date the respondent's solicitors expressed their intention to withdraw the said notice of motion and the court thereupon dismissed the same with no liberty to refile.

Now after almost three years on 8 April 1999, a notice of appeal has been filed in the High Court registry against the decision made on 25 July 1996. With respect, and without in any way transgressing into the territorial jurisdiction of the Court of Appeal, but strictly on a procedural point, the first question is whether an appeal in fact lies to the High Court, without firstly having exhausted the pre-requisite provisions of ss 243 and 307 of the Companies Act 1965. Section 243(1) reads:

> At any time after an order for winding-up has been made the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.

In other words, this section provides for an aggrieved or interested person who has been affected by the winding-up order to invoke s 243(1) and ask for a stay order, and upon obtaining such an order, to proceed to invoke s 307 of the Act for an order to declare the dissolution of the company as void, as if not having been dissolved. As s 307(1) reads:

> Where a company has been dissolved the court may at any time within two years after the date of dissolution, on the application of the liquidator of the company or of any other person who appears to the court to be interested, make an order upon such terms as the court thinks fit in declaring the

> dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

To my mind, the respondents' remedy here was not by way of an appeal, but to first exhaust the provisions of the sections, and only when the respondents failed to obtain such a relief, to have proceeded by giving a notice under r 12 of the Rules of the Court of Appeal 1994, which reads:

> No appeal shall, except by leave of the Court, be brought after the expiration of one month ... .

Again, under s 68(1) of the Courts of Judicature Act 1964, restrictions are placed on appeals to the Court of Appeal, unless leave to appeal is obtained under r 16 of the Rules of the Court of Appeal 1994:

> Where leave of the Court of Appeal is required, the application for such leave may be made to the Court before expiration of the time limited for bringing the appeal or within such enlarged time as the Court may allow.

in that besides satisfying the requirement of filing the notice of appeal within one month against the decision under r 12, the appellant is also required to apply for leave under r 16, and only upon such leave being granted (notwithstanding it being granted outside the one month), it relates back to the time of the making of that application within one month; the appeal is said to have been properly brought.

Subject to the procedural comments made herein above, the respondents have failed to satisfy the requirements of r 12 in failing to file the notice of appeal within the one month and thus cannot be said to have properly brought the appeal.

Reading the notice of appeal, the respondents are shown to be unhappy with the decision in winding-up the company; but the respondents had failed to attend court at the hearing to dispute the debt of the substituted creditors; due notice of that intention to support had been given.

To my mind, taking these facts in the circumstances and the law governing the Companies Act, the remedy of the aggrieved party is not by way of appeal to the Court of Appeal, but by way of application to court under notice of motion for a stay order under s 243(1) of the Companies Act, and followed by a declaratory order under s 307 of the said Act. There again, the time to invoke s 307(1) has now run out against the respondent/appellants by an effluxion of time as any such application is required to be made within two years of the date of dissolution of the company.

Order accordingly.

Reported by Loo Lai Mee